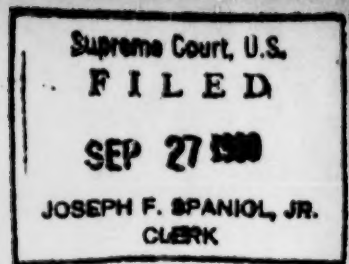


(2)
No. 90 - 445



**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1990

D. PATRICK WINBURN, *Petitioner,*

v.

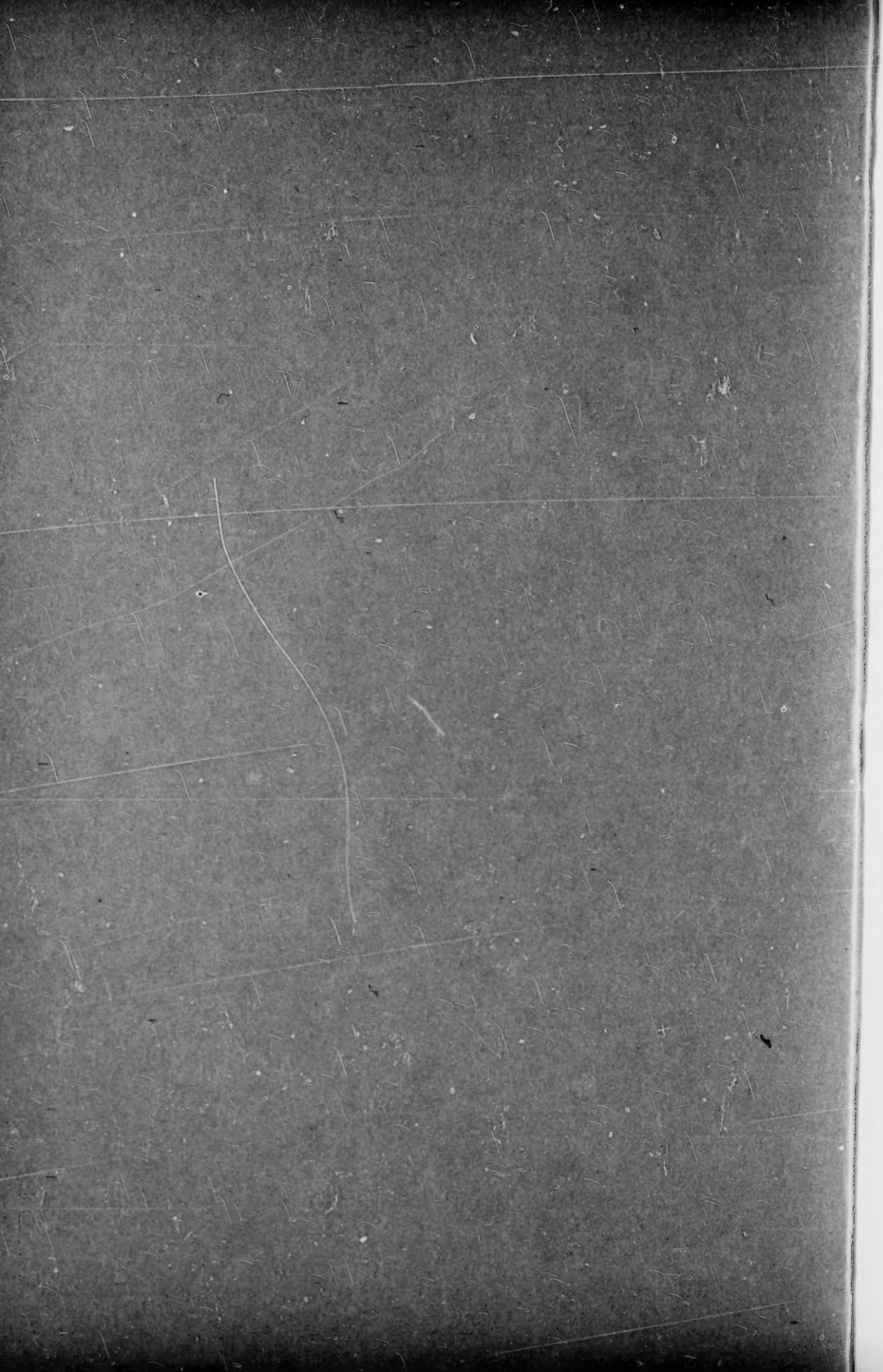
**BENNINGTON-RUTLAND SUPERVISORY UNION,
*Respondent***

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY



QUESTION PRESENTED FOR REVIEW

Does the United States Constitution require that the voting apportionments of a school supervisory union be proportional to the populations of the towns it serves when the voting members are elected from local school boards after being elected by their respective towns and there is no statutorily mandated direct election between the two boards?



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STATUTES INVOLVED

16 Vt. Stat. Ann. §423 Directors, number, election; term

(a) Each town school district shall have a school board consisting of three directors, one of whom shall be elected by ballot at each annual meeting of the town school district for a term of three years, beginning the day of election or until a successor is elected and qualified, unless a town school district is a member of a unified union district.

(b) The electorate may vote at an annual or special town school district meeting to elect not more than two additional directors for terms of either one or two years. When the terms are to be for two years, the warning for the meeting shall so specify. If two additional directors are elected they shall have terms of the same length, but if the terms are to be for two years, when the additional directors are first elected, one shall be elected for one year and the other director for two years. Terms of these additional directors shall end on annual meeting days. If the additional directors are elected at a special meeting the term of those elected for one year shall expire on the next annual meeting day and those elected for two years shall expire on the second annual meeting day following their election.

(c) The electorate shall continue to elect additional school directors until it votes at a meeting duly warned for the purpose to rescind its previous action under subsection (b) of this section; but the additional directors then in office shall continue in office until the end of the term to which they were elected.

(d) A town school district which holds its annual meeting on a day other than annual town

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS

TO THE HONORABLE SENATE OF THE UNIVERSITY OF CHICAGO
IN RESPONSE TO A RESOLUTION PASSED AT ITS MEETING OF
MAY 15, 1956, CONCERNING THE PROPOSED
REVISION OF THE CHARTER OF THE UNIVERSITY OF CHICAGO
BY THE BOARD OF TRUSTEES OF THE UNIVERSITY OF CHICAGO
IN 1955

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF CHICAGO
HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF YOUR
LETTER OF MAY 15, 1956, AND TO ADVISE YOU THAT
IT HAS BEEN REFERRED TO THE BOARD OF TRUSTEES OF THE
UNIVERSITY OF CHICAGO FOR CONSIDERATION. THE BOARD
OF TRUSTEES OF THE UNIVERSITY OF CHICAGO HAS THE
HONOR TO ADVISE YOU THAT IT HAS BEEN REFERRED TO
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meeting day may vote to elect its officers and its representative directors to union school districts on town meeting day. Their terms of office shall commence on the annual school district meeting day unless the district votes to have the terms of office commence on town meeting day.

IN THE
SUPREME COURT OF THE UNITED STATES
Docket No. 90-445

D. PATRICK WINBURN, *Petitioner*,

v.

BENNINGTON-RUTLAND
SUPERVISORY UNION, *Respondent*

RESPONDENTS BRIEF IN OPPOSITION

The Respondent, Bennington-Rutland Supervisory Union, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case. The opinion is unreported.

STATEMENT OF THE CASE

The Bennington-Rutland Supervisory Union (BRSU) has been created, defined and governed by 16 Vt. Stat. Ann. §§261-267 (1989). The BRSU board consists of 21 voting members each of whom has been elected to a town school board. Joint Appendix to the

Second Circuit Briefs at 10. A town school board which employs a teacher gets three voting representatives on the BRSU board; a town school board which does not employ any teachers gets one voting representative. In essence, those towns which operate schools themselves (as opposed to sending children to other towns on a tuition basis) have three votes; those towns that do not operate a school have one vote.

There is no consideration of town population in the apportionment of votes. 16 Vt. Stat. Ann. §266 (1989).

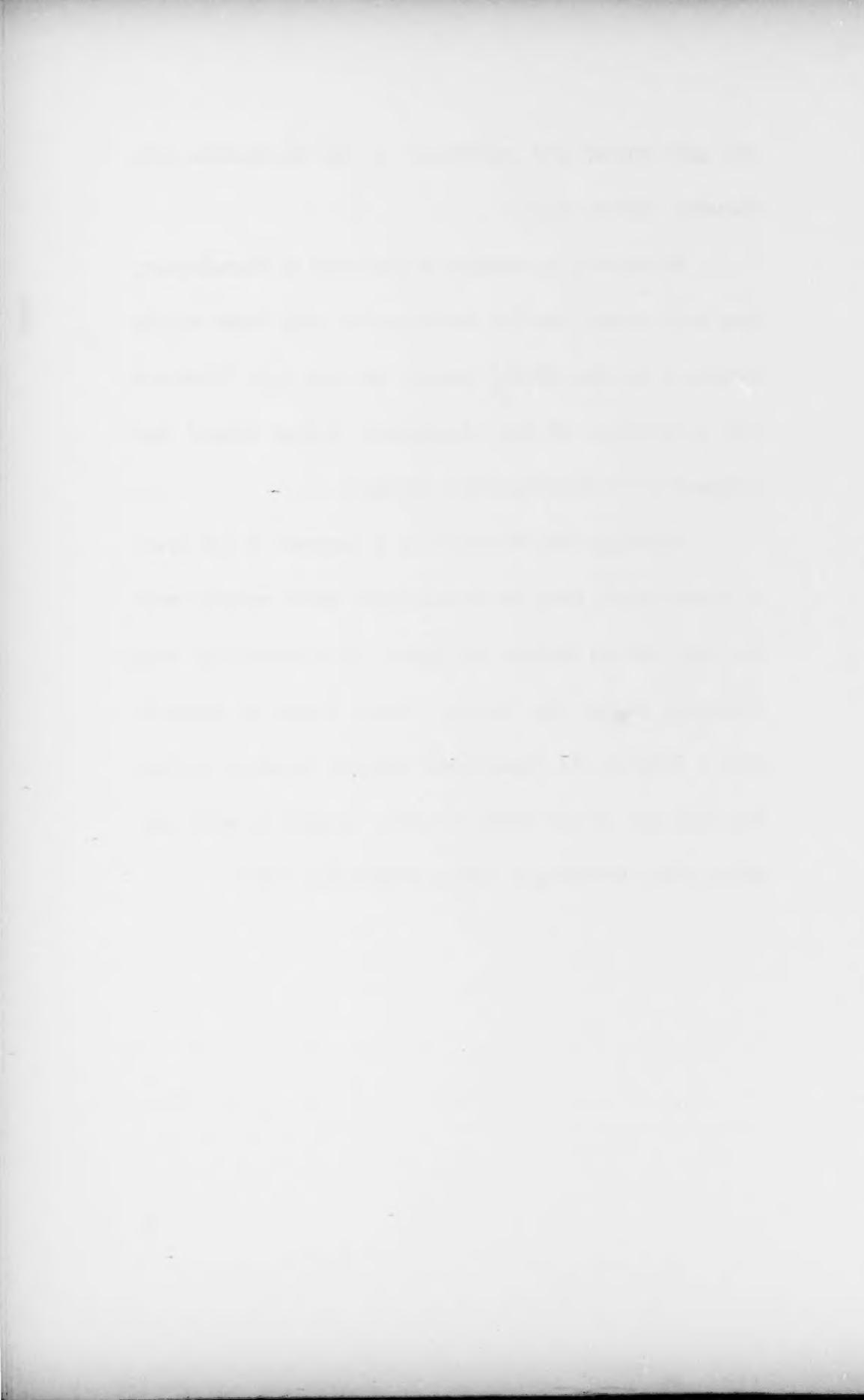
In each town the members of the local board elect among themselves who is to be the delegate (or are to be the delegates) to the BRSU board. 16 Vt. Stat. Ann. §266 (1989).

The other local school board members are free to attend the BRSU board meetings and participate in the discussions, however, they cannot vote. The public

can also attend and participate in the discussions but, likewise, cannot vote.

Winburn is a resident of the town of Manchester; that local board has five members but only three voting members on the BRSU board. At one time Winburn was a member of the Manchester School Board but resigned prior to completing his term.

Although Mr. Winburn, as a taxpayer in the town of Manchester, feels he should have more control over the way his tax dollars are spent, he conceded in oral argument before the Second Circuit Court of Appeals that a child in the Manchester schools receives neither less aid nor fewer services when compared with any other child attending a school within the BRSU.



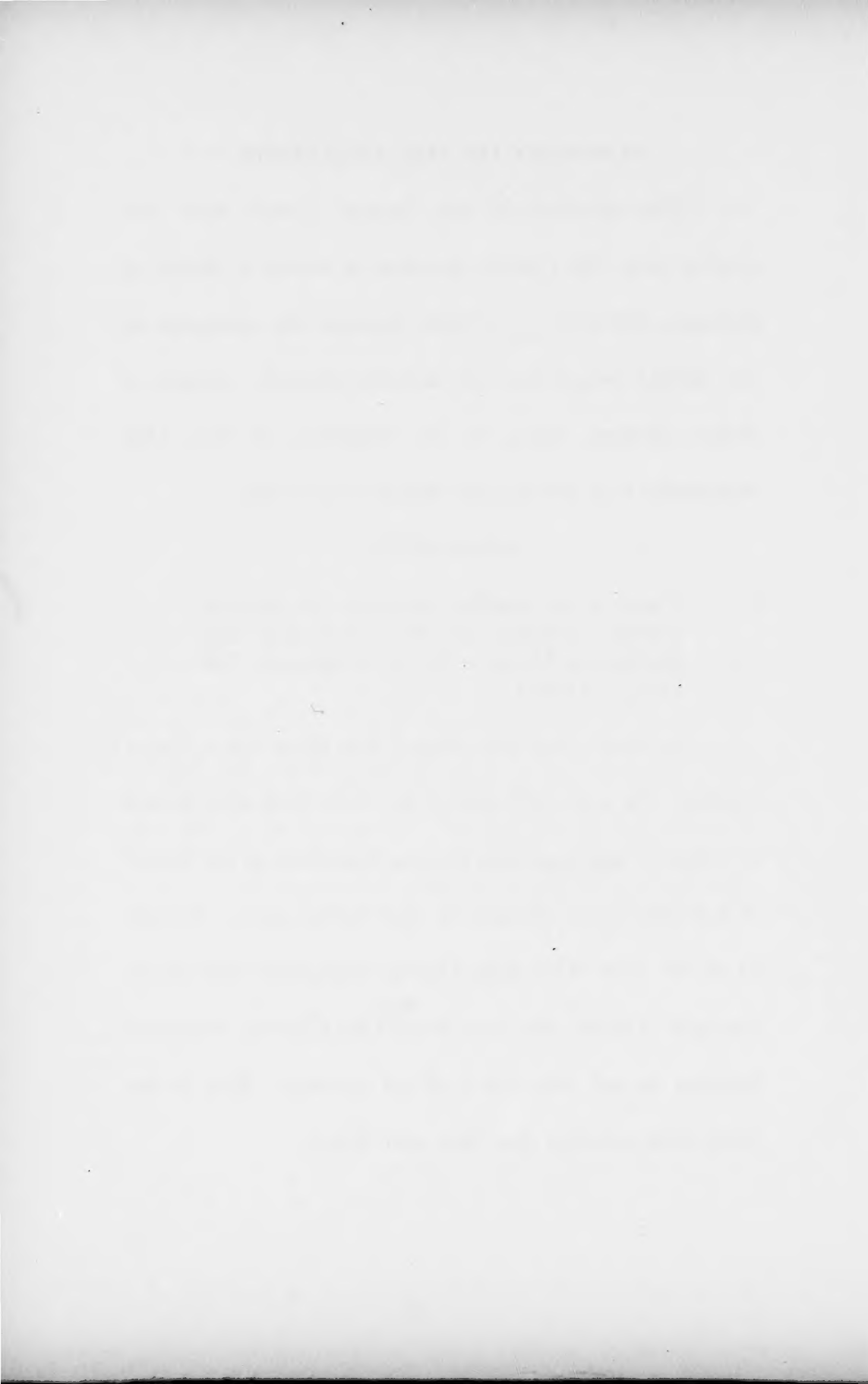
SUMMARY OF THE ARGUMENT

The decision of the Second Circuit does not conflict with this Court's decision in *Morris v. Board of Estimate*, 489 U.S. ____ (1989), because the delegates to the BRSU board are not directly elected. Absent a direct election there is no violation of the 14th Amendment of the United States Constitution.

ARGUMENT

- I. There is no conflict between the Second Circuit decision in this case and the decision in *Morris v. Board of Estimate*, 489 U.S. ____ (1989).

In *Morris* this court found that there was a direct election; the eight officials of the New York City Board of Estimate automatically became members of the Board of Estimate upon election to their initial posts. Section 61 of the New York City Charter mandated that direct election. Unlike the New York City Charter, Vermont Statutes do not mandate a direct election. This is the distinction between this case and *Morris*.



In this case, there is no such automatic or direct election. In Vermont, a school board is required to have at least three members; however, it can choose to have more. Although petitioner is correct that 16 Vt. Stat. Ann. §423(a) requires that a town school district have a school board made up of a minimum of three directors, he neglects to mention that 16 Vt. Stat. Ann. §423(b) allows a district to elect two additional directors at any time during the year so long as the election is duly warned. Once a town adds the additional directors to the board those two positions can only be rescinded by an election at town meeting which is held on the first Tuesday in March. Even if the positions are rescinded the additional directors are to serve out the remainder of their respective terms. 16 Vt. Stat. Ann. §423(c) (1989).

Each town is given the option and can choose to have additional directors or rescind the choice in an



election on town meeting day. In eight of the nine school districts which make up the BRSU, the local school board has more members than they have delegates to the BRSU. App. at 28.

The townspeople of Manchester chose to have five members on their local school board; they are entitled to have three members and votes on the BRSU board. There has not been, and it is impossible for there to be, a direct election of the Manchester school board delegates to the BRSU.

Rupert, the one district that has the same number of local board members as it has delegates to the BRSU voluntarily chose to have it that way. There are any number of reasons why Rupert would have chosen to have only three members on its school board. At the very least, it may have been pragmatic; their school system only has three teachers. Rupert, like the other five towns which operate a school and have three

votes on the BRSU, could have chosen to have five members on its local board. Instead, the townspeople chose not to do so.

If the town of Rupert voluntarily chose to have the same number of school directors as delegates to the BRSU then it is free to do so. The decision to have the same number is not mandated by any Vermont statute. That free choice to have the same number of local board members as delegates to the BRSU does not offend the 14th Amendment of the United States Constitution.

Regardless of the choice made by the townspeople of Rupert, the Vermont statutes do not mandate a direct election of local school board members to the BRSU board. Therefore there is no conflict between the Second Circuit decision in this case and the decision in *Morris v. Board of Estimate*, 489 U.S. ____ (1989)

- II. There is no conflict between the decisions in *Morris v. Board of Estimate*, 489 U.S. (1989) and in *Rosenthal v. Board of Education*, 385 F.Supp. 223 (E.D.N.Y. 1974), affirmed without opinion, 420 U.S. 985 (1975).

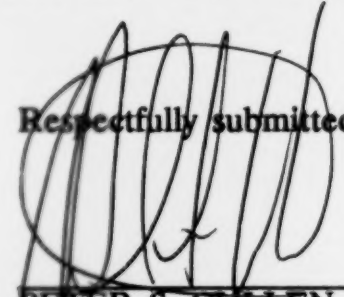
In *Rosenthal v. Board of Education*, 385 F.Supp. 223 (E.D.N.Y. 1974), affirmed without opinion, 420 U.S. 985 (1975), the court ruled on an appointment scheme similar to the one in this case and was not faced with a direct election as was in *Morris*. Section 1901 of New York Education Law did not create a situation where the local school board members become members of the central high school district as a matter of law upon their various elections so that the constitutional safeguard enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964), was triggered. Without a direct election mandated by statute there is no conflict between the decisions in *Morris v. Board of Estimate*, 489 U.S. ____ (1989) and *Rosenthal v. Board of Education*, 385 F.Supp. 223 (E.D.N.Y. 1974), affirmed without opinion, 420 U.S. 985 (1975).



CONCLUSION

There is no conflict between the cases decided — in this court and the Second Circuit Court of Appeals decision in this case. Therefore, the respondent respectfully requests this court deny the petition for writ of certiorari.

Respectfully submitted,



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Dated: September 18, 1990